ABDUL RAHMAN ISA

v.

PUBLIC SERVICE COMMISSION

HIGH COURT MALAYA, JOHOR BAHRU
LC VOHRAH J
[ORIGINATING MOTION NO. 25-17 OF 1989]
24 JANUARY 1991

ADMINISTRATIVE LAW: *Certiorari - Dismissal - Natural justice - Consideration of extraneous matter - Post-decisional hearing - Null and void - Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 4(2)(c)(i), 4(2)(f), 4(2)(g), 4(2)(i), 26.*

LABOUR LAW: *Employment - Dismissal - Natural justice - Consideration of extraneous matter - Post-decisional hearing - Null and void - Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 4(2)(c)(i), 4(2)(f), 4(2)(g), 4(2)(i), 26.*

The applicant A was a Customs Officer attached to the Royal Malaysian Customs and Excise Department, Johore Bahru for 7 years. The respondent PSC by letter dated 27 September 1988, asked A to show cause as to why he should not be dismissed, alleging that A had, on a certain occasion, substituted 100 tyres with 40 tyres thereby resulting in inability by the Customs Office in examining the 100 tyres. PSC alleged that this was a breach of General Orders 4(2)(c)(i), 4(2)(f), 4(2)(g) and 4(2)(i) of the Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 1980 (the Orders).

By letter dated 14 October 1988, A denied the allegations and requested an oral hearing; PSC on 1 March 1989 issued A's letter of dismissal.

In his affidavit in reply PSC's Chairman stated that A's failure to report that he had been detained by a group of 6 Chinese men depicted that a conspiracy had taken place. Although this did not form part of the substance of the charge in the show cause letter, it was clear that this question of conspiracy was an important factor which affected PSC's decision to dismiss A.

A, by notice of motion, sought an order of *certiorari* to quash PSC's decision.

Held:

[1] Denial of oral hearing

(a) On a construction of paras. (5) (6) (7) and (ii), General Order 26, it is implicit that only if a Committee of Inquiry is appointed will the applicant be given the opportunity of producing oral evidence;

(b) PSC, having acted under para. (4) of General Order 26, in deciding to dismiss A after considering his representation, had a discretion to disallow the oral hearing requested for as it had complied with the *audi alteram partem* rule;

(c) At the stage when the show cause letter was sent and A's letter for request of an oral hearing, there was no obligation on PSC's part to grant an oral hearing; PSC was entitled to deliberate and decide on the representation as it stood;

(d) A was not entitled as a matter of right to an oral hearing and the decision of PSC cannot be said to have been made in breach of natural justice just because it was arrived at without according A the oral hearing he had specifically requested for;

(e) strict insistence upon an inexorable right to the traditional Courtroom procedure can lead to a virtual administrative breakdown because a formal hearing is too slow, too technical and too costly.

[2] Consideration of extraneous matter

(a) The alleged presence and involvement of these 6 men, whose very presence A categorically denies, was of damning effect and was in fact the foremost reason given by PSC for its decision;

(b) A was not informed of the circumstances relating to the alleged conspiracy - these circumstances were required to be made known to him so that he would have had the opportunity to refute the existence of such a conspiracy;

(c) PSC had therefore committed a procedural impropriety by not disclosing this information it had, thus depriving A of the opportunity to explain the circumstances;

(d) the right to a hearing has no meaning if all relevant material to be relied upon by an adjudicating body against a person is not brought to his notice and he be given an opportunity to comment, explain or rebut such material;

(e) the order dismissing A was null and void and must be quashed although it has been averred by the PSC's Chairman that the respondent "had acted in a fair manner independently, *bona fide* and lawfully at all material times."

[3] Post-decisional hearing (that is, that by virtue of the words in the introductory paragraph of the show cause letter, PSC had made up its mind to dismiss A even before hearing him.)

(a) The action referred to in that paragraph was being taken only with a view to dismissal under General Order 26, which specifically lays down the procedure;

(b) it can only mean what it says and cannot read as indicating that PSC had already made up its mind to dismiss A without first considering his representation;

(c) it is clear from the provisions of this General Order that a *prima facie* case has first to be made out from information PSC has received before an officer is called upon to answer the charge by way of a written representation;

(d) it cannot and should not be inferred from the language of the introductory paragraph that a decision had already been made to dismiss A from the service before he was asked to make his written exculpatory representation.

[Certiorari granted to quash decision of the respondent.]

Cases referred to:
Najar Singh v. Government of Malaysia & Anor. [1976] 1 MLJ 203
Ketua Pengarah Kastam v. Ho Kwan Seng [1977] 2 MLJ 152
Shamsiah bte. Ahmad Sham v. Public Services Commission, Malaysia & Anor. [1991] 1 CLJ (Rep) 419

Legislation referred to:
Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 1980, General Orders 4(2)(c)(i), 4(2)(f), 4(2)(g), 4(2)(i), 26

Other sources referred to:
Administrative Law of Malaysia and Singapore by M.P. Jain, 2nd. Edn., p. 267

For the applicant - T. Balaskanda; M/s. Zaman & Associates
For the respondent - Noor Aini bte. Zulkiflee, Federal Counsel

JUDGMENT

LC Vohrah J:

By this notice of motion the applicant seeks an order of *certiorari* in order to quash the decision of the respondent dismissing him from the public service as a customs officer.

The applicant was a Customs Officer attached to the Royal Malaysian Customs & Excise Department, Johore Bahru and at the time of dismissal had been in service for 7 years. On or about 10 October 1988 the respondent by a letter dated 27 September 1988 asked the plaintiff to show cause as to why he should not be dismissed from the public service. This letter is reproduced in full:

> Ruj. Kami: SPA.SULIT.
> 239391/3(12)
> 27 September 1988
> 16 Safar 1409.
>
> Encik Abdul Rahman bin Isa,
>
> Melalui:
> dan
> Salinan:
>
> Ketua Pengarah Kastam,
> Kastam dan Eksais Diraja Malaysia,
> Blok 11, Kompleks Pejabat-Pejabat Kerajaan,
> Jalan Duta,
> 50596 Kuala Lumpur.
>
> (u.p: Encik Mohd. Noor bin Abdul Hamid)
>
> Tuan,
> **Kenyataan Alasan-Alasan Membuang Kerja**
>
> Saya memaklumkan iaitu berikutan dengan laporan yang diterima, maka Suruhanjaya ini sebagai pihak berkuasa tatatertib yang berkenaan telah membuat keputusan untuk mengambil tindakan tatatertib dengan tujuan buang kerja terhadap tuan di bawah Perintah Am 26, Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab D), 1980 atas pertuduhan berikut:
>
> Bahawa tuan, Abdul Rahman bin Isa, Pegawai Kastam Tingkatan I(No.4414), Bahagian Import 'A', Jabatan Kastam dan Eksais Diraja Malaysia, Johor Bharu, Johor Darul Takzim ketika bertugas di Jabatan Kastam dan Eksais Diraja Malaysia, Kuala Sedili, Kota Tinggi, Johor Darul Takzim pada 1 Disember 1986 diantara pukul 4.00 petang hingga 9.00 malam ketika dalam perjalanan mengiringi sebuah lori No. Pendaftaran JT 1068 dengan muatan lebih kurang 100 biji tayar yang disyaki belum dibayar duti kastam dari Simpang Blungkor di kawasan Felda Papan Timur, Kuala Sedili, Johor Darul takzim ke pejabat tuan pada ketika itu telah membenarkan tayar-tayar tersebut dipunggah dari lori No. Pendaftaran JT 1068 dan ditukarkan dengan 10 biji tayar jenis 'Bridgestone' dan 30 biji tayar jenis 'Michelin' yang telah dibayar duti kastamnya. Akibat perbuatan tuan membenarkan pemunggahan dan pertukaran tayar tersebut telah menyebabkan pihak Jabatan tidak dapat membuat pemeriksaan terhadap lebih kurang 100 biji tayar berkenaan dengan kerugian duti kastam yang belum dibayar dianggarkan bernilai lebih kurang RM8,000 (ringgit lapan ribu). Perbuatan tuan ini adalah bercanggah dengan Perintah Am 4(2)(c)(i), 4(2)(f), 4(2)(g) dan 4(2)(i), Perintah-perintah Am Pegawai Am (Kelakuan dan Tatatertib) (Bab 'D'), 1980 yang menyatakan seseorang pegawai tidak boleh berkelakuan dengan apa-apa cara yang mungkin menyebabkan syak yang munasabah bahawa ia telah membiarkan kepentingan persendiriannya dan bercanggah dengan kewajipan awamnya sehingga menjejaskan kegunaannya sebagai seorang pegawai awam, tidak jujur, tidak bertanggungjawap dan ingkar perintah atau berkelakuan dengan apa-apa cara yang boleh ditafsirkan dengan munasabah sebagai ingkar perintah.

2. Mengikut kehendak Perintah Am 26(2), Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab 'D') 1980, tuan adalah diminta mengemukakan:

(a) Jawapan dengan pertuduhan ini; dan

(b) Hujah-hujah sebagai pembelaan diri mengapa tindakan tatatertib buang kerja tidak boleh diambil terhadap tuan sekarang.

Jawapan dan hujah-hujah pembelaan diri tuan itu hendaklah dikemukakan kepada Setiausaha, Suruhanjaya Perkhidmatan Awam, melalui Ketua Jabatan tuan dalam tempoh dua puluh (20) hari daripada tarikh tuan menerima surat ini. Sekiranya tuan tidak memberi sebarang jawapan dalam tempoh masa yang ditetapkan itu, tuan akan dianggap sebagai tidak hendak mengemukakan sebarang pembelaan diri dan perkara ini akan diputuskan atas keterangan-keterangan yang ada sekarang ini sahaja.

3. Sila tuan akui penerimaan surat ini.

"Berkhidmat Untuk Negara"

Saya yang menurut perintah,
(Tandatangan)
(Dato' Sulaiman bin Osman)
Setiausaha,
Suruhanjaya Perkhidmatan Awam,
Malaysia.

By a letter dated 14 October 1988 the applicant made his representation giving the reasons as to why he should be exculpated. His letter reads:

Setiausaha,
Suruhanjaya Perkhidmatan Awam,
Bahagian Naik Pangkat/Tatatertib,
Tingkat 18, Bangunan Perangsang Segemal,
Jalan Kampung Attap,
50520 Kuala Lumpur.

Melalui:
dan
Salinan

Ketua Pengarah Kastam,
Kastam & Eksais Diraja Malaysia,
Blok 11, Kompleks Pejabat Kerajaan,
Jalan Duta,
50592 Kuala Lumpur.

Tuan,
Per: **Kenyataan Alasan-Alasan Membuang Kerja**

Surat tuan bertarikh 27 September 1988 dirujuk. Dukacita dimaklumkan bahawa tuduhan yang dibuat terhadap saya itu tidak benar. Tuan tidak boleh membuat tuduhan berasaskan satu syak wasangka sahaja. Saya berani mengangkat sumpah bahawa tuduhan yang dibuat kepada saya tidak benar. Tidak ada bukti yang menunjukkan bahawa lori JT 1068 ada membawa muatan lebih kurang 100 biji tayar. (Tuduhan tidak menunjukkan jumlah tayar yang sebenarnya.)

Dalam Cawangan Pencegah di Jabatan Kastam dan Eksais DiRaja, Pegawai-pegawai Kastam Tingkatan Biasa selalunya diberi hadiah apabila mendapati satu-satu kes. Jika kes ini telah diperolehi oleh kumpulan pegawai kastam yang lain maka Pegawai Kastam yang mempunyai maklumat yang sama dan tidak memperolehi kes ini tidak akan mendapat hadiah atau reward. Dalam kes ini jelas bahawa pada 1 Disember 1986 saya telah menahan sebuah lori lebih kurang

jam 2.45 petang. Lori ini setelah ditahan dan dalam proses pemeriksaan, satu kenderaan Jabatan Kastam WAY 1249 telah tiba ditempat itu. Terdapat 3 orang Pegawai Kastam dari Bahagian Pencegah, Johor Bahru. Mereka keluar dari kereta tersebut dan mengatakan bahawa mereka ada maklumat ke atas lori ini dan ini adalah kes mereka. Saya menghalang mereka dari mengambil alih kes ini dan mengatakan bahawa ini adalah kes yang diperolehi oleh saya. Mereka garikan pemandu lori dan beredar dari situ.

Pegawai Kastam dari Johor Bahru tidak langsung memeriksa isi kandungan lori JT 1068. Ini cuma diagak oleh mereka sahaja. Mereka juga boleh mengagak terdapat cuma 40 biji tayar ataupun 200 biji tayar. Jadi selagi tidak diperiksa dan dikira ini cuma anggapan sahaja. Yang sebenarnya lori yang di bawa balik ke Pejabat Kastam, Kuala Sedili itu hanya pertama kali diperiksa rapi di Pejabat Kastam, Kuala Sedili. Ini boleh disahkan oleh Peguasa Kastam, En. Siva.

Tuduhan bahawa terdapat penukaran tayar dari lebih kurang 100 biji tayar kepada 40 biji tayar juga tidak masuk akal oleh sebab saya tidak akan berani berbuat demikian memandangkan bahawa saya tahu yang Pegawai Kastam Pencegah, Johor Bahru juga telah melihat saya memperolehi kes ini dan sudah tentu mereka akan melapurkan hal ini kepada Ketua Bahagian Pencegah, Johor Bahru.

Saya ingin mendengar saksi-saksi bagi pihak tuan memberi keterangan dalam kes ini supaya saya dapat membela diri saya dengan menyoal balas ketiga-tiga Pegawai Kastam Pencegah tersebut untuk membuktikan bahawa keterangan mereka tidak benar.

Saya menafikan dengan keras tuduhan yang dibuat terhadap saya. Jika terdapat bukti-bukti yang nyata saya rela dituduh di mahkamah di mana saya boleh membela diri saya.

Pegawai Penyiasat Jabatan Kastam, Johor Bahru, En. Ishak di dalam soal siasat beliau beberapa kali untuk memperdayakan saya dan mencadangkan macam-macam terhadap saya. Oleh sebab itu saya memberitahu beliau bahawa jika betul seperti apa yang dicadangkan oleh beliau yang saya telah melakukan perkara ini, maka saya rela dituduh di mahkamah. Beliau marah apabila saya bercakap begitu dan beliau berkata "Aku ibarat durian dan kau mentimun. Jika golek durian, mentimun juga yang akan cedera dan jika mentimun yang menggolek, mentimun juga yang akan cedera." Beliau juga berkata bahawa beliau akan memaksa pemandu untuk membuat cerita supaya saya bersalah.

Saya meminta suatu pembicaraan di mana saya boleh dengar saksi-saksi yang akan dipanggil oleh pihak tuan dan saya juga akan mendapat saksi-saksi saya yang boleh memberi keterangan lisan kepada tuan untuk membuktikan bahawa tuduhan ini tidaklah benar. Saksi-saksi saya dapat membuktikan bahawa tuduhan penukaran tayar tidak berlaku langsung. Apa yang ditahan telah dibawa ke Pejabat Kastam, Kuala Sedeli dan diserahkan kepada Peguasa Kastam, En. Siva. Semasa En. Siva melepaskan lori serta tayar selepas berpuas hati bahawa cukai telah dibayar, enjin lori tidak boleh start. En. Siva membenarkan bateri kereta beliau digunakan untuk start enjin lori tersebut. Ini menunjukkan bahawa lori ini memang menghadapi masalah. Jadi kelewatan tiba di Pejabat Kastam adalah sebab enjin mati dan susah dihidupkan semula.

Saya telah menjalankan tugas saya dengan jujur, bertanggungjawab dan saya tidak ingkar perintah. Pegawai-pegawai Kastam Pencegah Johor Bharu yang meminta supaya kes ini diserahkan kepada mereka bukanlah Pegawai Kastam yang berpangkat lebih tinggi dari saya. Saya tidak pernah membenarkan kepentingan persendirian bercanggah dengan kewajipan sebagai pegawai awam.

Saya merayu supaya tuan tidak membuat sebarang keputusan tanpa memberi peluang saya membela diri di dalam pembicaraan di Mahkamah atau pembelaan diri di hadapan Lembaga Tata Tertib setelah mendengar saksi-saksi bagi pihak tuan.

Atas kerjasama tuan saya ucapkan ribuan terima kasih.

Yang benar.

(Emphasis added).

Sometime around 1 March 1989 he received a letter dated 17 February 1989 from the respondent informing him that he had been dismissed from the service with immediate effect. It reads:

Encik Abdul Rahman bin Isa

Melalui
dan
Salinan:

Ketua Pengarah Kastam,
Ibu Pejabat Kastam dan Eksais Diraja Malaysia,
Bahagian Pentadbiran Am dan Kewangan,
Blok 11, Kompleks Pejabat-pejabat Kerajaan,
Jalan Duta,
50596 Kuala Lumpur.

Tuan,

Keputusan Tatatertib Suruhanjaya Perkhidmatan Awam

Saya diarahkan menarik perhatian kepada surat Suruhanjaya SPA. SULIT.239391/3/(12) bertarikh 27 September 1988 meminta tuan mengemukakan hujah-hujah bagi membebaskan diri tuan daripada tindakan tatatertib di bawah Perintah Am 26, Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab 'D') 1980. Tuan telah mengemukakan jawapan sebagai pembelaan diri menerusi surat tuan bertarikh 14 Oktober 1988.

2. Dimaklumkan bahawa Suruhanjaya Perkhidmatan Awam dalam mesyuaratnya yang ke-1537 pada 30 Januari 1989 setelah menimbangkan dengan teliti kes tuan pada keseluruhannya telah memutuskan bahawa tuan dikenakan hukuman buang kerja berkuatkuasa dengan serta merta.

"Berkhidmat Untuk Negara"

Saya yang menurut perintah,
tandatangan
(Roslee bin Anuar)
Bahagian Naik Pangkat/Tatatertib,
b.p. Setiausaha,
Suruhanjaya Perkhidmatan Awam,
Malaysia.

The respondent followed the procedure laid down in General Order 26 of the Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 1980 which reads as follows:

26(1) Tatacara bagi kes-kes yang patut dikenakan hukuman buang kerja atau turun pangkat.

Jika representasi dibuat kepada Pihak Berkuasa Tatatertib Yang Berkenaan atau jika didapati olehnya bahawa seseorang pegawai adalah bersalah kerana kerja yang tidak memuaskan dan kerja atau salah-laku itu pada pendapat Pihak Berkuasa Tatatertib itu, patut dikenakan hukuman buang kerja atau turun pangkat, maka peruntukan-peruntukan di dalam perenggan-perenggan yang berikut hendaklah dipakai.

(2) Pihak Berkuasa Tatatertib Yang Berkenaan hendaklah, setelah menimbangkan segala maklumat yang ada dalam miliknya bahawa ada kes *prima facie* untuk membuang kerja atau menurunkan pangkat, mengarahkan supaya satu pernyataan bertulis, yang disediakan jika perlu, dengan bantuan Jabatan Undang-Undang, dihantar kepada pegawai itu, menyatakan alasan atau alasan-alasan yang dicadangkan untuk membuang kerja atau menurunkan pangkat pegawai itu dan hendaklah meminta pegawai itu membuat, dalam tempoh tidak kurang daripada empat belas hari daripada tarikh surat itu diterima, satu representasi secara bertulis yang mengandungi alasan-alasan yang ia hendak gunakan membebaskan dirinya.

(3) Jika setelah dipertimbangkan representasi tersebut, Pihak Berkuasa Tatatertib Yang Berkenaan berpendapat bahawa kerja atau kelakuan pegawai itu yang tidak memuaskan adalah tidak cukup berat untuk menganggapkan patut ia dibuang kerja atau diturunkan pangkat, Pihak Berkuasa Tatatertib itu bolehlah mengenakan apa-apa hukuman yang lebih ringan sebagaimana yang difikirkannya patut ke atas pegawai itu.

(4) Jika pegawai itu tidak mengemukakan apa-apa representasi dalam tempoh yang ditentukan itu, atau jika ia mengemukakan representasi yang tidak dapat membebaskan dirinya dengan memuaskan hati Pihak Berkuasa Tatatertib Yang Berkenaan, maka Pihak Berkuasa Tatatertib itu hendaklah terus menimbangkan dan memutuskan perkara membuang kerja atau menurunkan pangkat pegawai itu.

(5) Jika Pihak Berkuasa Tatatertib Yang Berkenaan berpendapat bahawa kes terhadap pegawai itu memerlukan penjelasan selanjutnya, Pihak Berkuasa Tatatertib itu bolehlah melantik satu Jawatankuasa Siasatan yang terdiri daripada tidak kurang daripada dua orang pegawai kanan kerajaan yang hendaklah dipilih dengan mengambil perhatian yang semestinya tentang kedudukan pegawai yang berkenaan itu dan tentang jenis serta beratnya aduan-aduan yang menjadi perkara siasatan itu, dengan syarat bahawa seseorang pegawai yang lebih rendah pangkatnya daripada pegawai yang disiasat itu atau Ketua Jabatan pegawai itu tidak boleh dipilih menjadi Ahli Jawatankuasa itu.

(6) Pegawai itu hendaklah diberitahu bahawa, pada hari yang ditetapkan, soal buang kerja atau turun pangkat itu akan dibawa ke hadapan jawatankuasa dan bahawa ia akan dibenarkan dan jika jawatankuasa memutuskan sedemikian, ia adalah dikehendaki hadir di hadapan jawatankuasa itu dan membebaskan dirinya.

(7) Jika saksi-saksi diperiksa oleh jawatankuasa, pegawai itu hendaklah diberi peluang hadir dan menyoal saksi-saksi itu bagi pihak dirinya sendiri dan tiada keterangan berupa dokumen boleh digunakan terhadapnya melainkan jika ianya telah terlebih dahulu diberi satu salinan dokumen itu atau dibenarkan melihatnya.

(8) Jawatankuasa boleh membenarkan kerajaan atau pegawai itu diwakili oleh seorang pegawai dalam perkhidmatan awam atau, dalam keadaan yang tertentu, oleh seorang peguambela dan peguamcara dan, tertakluk kepada apa-apa penangguhan yang munasabah perlu untuk membolehkan pegawai itu sendiri membentangkan kesnya, boleh menarik balik kebenaran itu pada bila-bila masa:

Dengan syarat jika jawatankuasa itu membenarkan kerajaan diwakili, ia hendaklah membenarkan pegawai itu diwakili.

(9) Jika dalam masa menjalankan siasatan itu, terzahir lagi alasan-alasan untuk membuang kerja pegawai itu, dan Pihak Berkuasa Tatatertib Yang Berkenaan fikirkan patut untuk meneruskan tindakan terhadap pegawai itu, pegawai itu hendaklah diberi satu pernyataan bertulis mengenai alasan-alasan itu dan langkah-langkah yang sama hendaklah diambil seperti yang ditetapkan di atas mengenai alasan-alasan yang asal itu.

(10) Setelah menyiasat perkara itu, jawatankuasa itu hendaklah membuat satu laporan kepada Pihak Berkuasa Tatatertib Yang Berkenaan. Jika Pihak Berkuasa Tatatertib itu berpendapat bahawa laporan itu tidak jelas mengenai apa-apa perkara atau bahawa siasatan selanjutnya adalah dikehendaki, maka perkara itu boleh dirujukkan kembali kepada jawatankuasa itu untuk menjalankan siasatan dan membuat laporan selanjutnya.

(11) Jika setelah menimbangkan laporan jawatankuasa itu, Pihak Berkuasa Tatatertib Yang Berkenaan berpendapat -

(a) bahawa pegawai itu patut dibuang kerja atau diturunkan pangkat, maka Pihak Berkuasa Tatatertib itu hendaklah serta-merta mengarahkan sewajarnya;

(b) bahawa pegawai itu tidak patut dibuang kerja atau diturunkan pangkat, tetapi patut menerima hukuman yang lebih ringan, Pihak Berkuasa Tatatertib itu boleh mengenakan ke atas pegawai itu apa-apa hukuman yang lebih ringan sebagaimana yang difikirkan patut; atau

(c) bahawa pembicaraan itu menzahirkan alasan-alasan yang cukup untuk menghendaki supaya pegawai itu bersara demi kepentingan awam, Pihak Berkuasa Tatatertib itu hendaklah mengesyorkan kepada kerajaan dengan sewajarnya. Soal pencen hendaklah diuruskan di bawah Undang-Undang Pencen.

In his affidavit in support of this notice of motion the applicant avers that he had not committed any breach of the General Orders; that the facts of the case would show that only 40 tyres were detained by him and not 100 as alleged and that this could have been verified by the senior officer investigating the case with the owner of the tyres; and that the allegation he had released 100 tyres and substituted them with 40 other tyres was without any foundation and was actuated by malice towards him as he had refused to hand over his case to the three Customs Officers from the Preventive Branch. In his affidavit encl. (5) in support of this application one Tee Kok Cheng avers that he was the owner of the 40 tyres that had been detained; that he received a telephone call at about 10 pm from the driver of the lorry conveying the tyres that the tyres had been detained; that after locating the import declaration for the 40 tyres he left for Kuala Sedeli at about 11 pm arriving there at 1.40 am the following day; that he waited at the Customs Station until 2.30 am when the Senior Officer arrived; that he produced the customs import declaration form to the Senior Officer who after examination released the tyres on being satisfied that duty had been paid on them; that the lorry could not at first be started and was only started with the aid of the Senior Officer's car battery; and that he had at no time caused 100 tyres to be conveyed by the lorry or changed 100 tyres to 40 tyres, In his affidavit in reply the Chairman of the respondent averred that the respondent deliberated on the applicant's case on 30 January 1989 and decided to dismiss the applicant from service after finding that:

(a) **The failure of the applicant in reporting that he had been detained by a group of Chinese men depicted that a conspiracy had taken place;** (Emphasis added)

(b) the applicant's refusal to allow the 3 Customs Officers from the Preventive Branch to assist in the detention of the said lorry JT 1068 was highly suspect;

(c) the offence by him was grave and serious one and the arguments for his defence by virtue of his said reply was weak and of no merit and thus could not be accepted. Further, we were of the opinion that the representation of the applicant by virtue of his said reply had failed to exonerate himself to our satisfaction and thus there was no necessity for a further explanation. In his affidavit-in-reply the applicant denied the existence of the 6 Chinese men at any stage of the incident.

On the facts as presented above Counsel has challenged the decision of the respondent to dismiss the applicant from the service on three grounds which can be subsumed under the following brief heads:

(1) Denial of an oral hearing.

(2) Consideration of extraneous matter.

(3) Post-decisional hearing.

Denial of an Oral Hearing

There is no dispute that any action for dismissal or reduction in rank in respect of the applicant had to comply with the procedure above stated. The applicant's main complaint is that he was not given an opportunity of being heard orally before being dismissed and that he was entitled to an oral hearing after having demanded one. The question to be considered is whether under the procedure laid down in the above mentioned general order he is entitled to an oral hearing. Paragraph (5) provides that if, after the accused officer has made his representation the disciplinary authority considers that the case against the officer requires further clarification, it may appoint a committee of inquiry and para. (6) provides that the officer has to be given notice of the day on which the question of his dismissal or reduction in rank will come before the committee and told that he will be allowed and, if the committee so determine, required to appear before it and exculpate himself. Paragraph (7) provides that he had to be given the opportunity of being present when witnesses are examined and of putting questions to them. The committee then is required by para. (11) to report to the disciplinary authority which will then act on its report. It is, I think, implicit that only if a committee of inquiry is appointed will the applicant be given the opportunity of producing oral evidence (See *Najar Singh v. Government of Malaysia & Anor*. [1976] 1 MLJ 203 at p. 205 lcD). The argument of Federal Counsel (as I understand it) is that the respondent having acted under para. (4) in deciding to dismiss the applicant after considering his representation had a discretion and was "entitled to disallow the oral hearing requested for" as it had complied with the *audi alteram partem* rule and accordingly there has been no breach of natural justice. I agree. At the stage when the show cause letter was sent and the exculpatory letter furnished with a request for an oral hearing, there was, in my view, no obligation on the part of the respondent to grant an oral hearing and the respondent was entitled to deliberate and decide on the representation as it stood. Accordingly, I hold that the applicant was not entitled as a matter of right to an oral hearing and the decision of the respondent cannot be said to have been made in breach of natural justice just because it was arrived at without according the applicant the oral hearing he had specifically requested for. As was pointed out by Raja Azlan Shah FJ (as he then was) in *Ketua Pengarah Kastam v. Ho Kwan Seng* [1977] 2 MLJ 152

> the rule of natural justice that no man may be condemned unheard should apply to every case where an individual is adversely affected by an administrative action, no matter whether it is labelled "judicial", "quasi-judicial", or "administrative" or whether or not the enabling statute makes provision for a hearing. The hearing may take many forms and strict insistence upon an inexorable right to the traditional Courtroom procedure can lead to a virtual administrative breakdown. That is because a formal hearing is too slow, too technical and too costly. Lord Shaw's caveat on administrative adjudication that "judicial methods maybe entirely unsuitable, and produce delays, expenses, and public and private injury" is too well-known to be side-stepped.

Consideration of Extraneous Matter

As has been adverted to, the respondent's Chairman stated that in its deliberations it found that the applicant had failed to report that he had been detained by a group of 6 Chinese men and this failure to report "depicted that a conspiracy had taken place". This fact did not form part of the substance of the charge against the applicant in the respondent's show cause letter. It is clear this question of a conspiracy was an important factor which affected the decision of the respondent to dismiss the applicant. What the facts were which gave rise to the inference that there was a conspiracy involving the applicant have not been disclosed and clearly the adverse inference drawn against the applicant was made because

of his failure to mention these 6 persons in his written representation. Counsel for the applicant contends that nondisclosure of the circumstances relating to these individuals and the failure to allow the applicant to give an explanation regarding them constituted a breach of natural justice. In other words, the applicant's complaint is that the respondent in arriving at its decision took into account extraneous matter, namely the circumstances relating to these 6 men, without giving the applicant the chance to explain their presence or involvement, if any. Federal Counsel in reply argues that the respondent when it deliberates is guided by its powers under Chapter D of the General Orders and although it takes into account relevant reports brought by the department concerned it cannot be said that it acted unfairly or improperly. Both Counsel made reference to the most recent case of *Shamsiah bte. Ahmad Shan v. Public Services Commission, Malaysia & Anor.* [1991] 1 CLJ (Rep) 419 which involved a bookbinder with the Government Printing Development who was dismissed by the respondent after she had been found guilty of negligence and dereliction of duty. She applied to the High Court for a declaration that her dismissal was null and void. Her application was dismissed by the High Court and she appealed. The core of her complaint in the Supreme Court was that the respondent in arriving at its decision to dismiss her from service had taken into account extraneous matter, namely her record of past conduct which had been entered in her record of service and produced by her departmental head to the respondent without giving her an opportunity to explain, contradict or rebut them. It was held, *inter alia,* that the respondent had infringed the rule of natural justice in not affording her the opportunity to explain or controvert her record of service which played a part in influencing its decision to impose the severest punishment permissible under the relevant regulations and on that ground and in the light of the authorities cited the Court had no alternative but to allow the appeal. Jemuri SCJ had this to say (at p. 425):

> We are not saying and should not be quoted as saying that the past record of the appellant should be taken into account in considering her guilt or the appropriate punishment if she were found guilty of the charge. What we are saying is that if these materials which have such damning effect on her case are to be used against her she should be given a right to be heard on them. It is not a matter of pure technicalty but it is absolutely fundamental in law that the appellant should have been given an opportunity of stating her case regarding her past conducts, considering that the dismissal of a civil servant is no light matter.
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> The matter is not free from authorities and the law on it is well settled. We find support for this proposition in many cases. In the case of *Kanda v. Government of the Federation of Malaya* Lord Denning at p. 172 said:
>
> > If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him; and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn LC in *Board of Education v. Rice* [1911] AC 179 down to the decision of their Lordship's Board in *Ceylon University v. Fernando* [1960] 1 WLR 223. It follows, of course, that **the Judge or whoever has to adjudicate must not hear evidence or receive representation from one-side behind the back of the other**. The Court will not enquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The Court will not go into the likelihood of prejudice. The risk of it is enough. **No one who has lost a case will believe he has been fairly treated if the other side has access to the Judge without his knowing**. (The emphasis is ours.)

As stated earlier, the respondent relied substantially on facts relating to 6 Chinese men and on the failure of the applicant to report his detention by these 6 persons as the basis that there had been a conspiracy to justify its order for his dismissal. The alleged presence and involvement of these 6 men, whose very presence the applicant categorically denies, was of damning effect and was in fact the foremost reason given by the respondent for its decision. The circumstances relating to this alleged conspiracy would appear to be the gravamen of the charge against him and were not made known to him and applying the principles enunciated above, those circumstances were required to be made known to him so that he would have had the opportunity to refute the existence of such a conspiracy. The respondent had, accordingly, committed a procedural impropriety by not disclosing this information it had, thus depriving the applicant the opportunity to explain or to controvert the story relating to these 6 persons whose alleged involvement at the scene played such an important part in influencing the respondent's decision. The right to a hearing has no meaning if all relevant material to be relied upon by an adjudicating body against a person is not brought to his notice and he be given an opportunity to comment, explain or rebut such material. (See M.P. Jain's *Administrative Law of Malaysia and Singapore,* 2nd Edn., p. 267). I am therefore obliged to find that the order dismissing the applicant was null and void and must be quashed although it has been averred by the respondent's Chairman that the respondent "had acted in a fair manner independently, *bona fide* and lawfully at all material times."

Post-decisional Hearing

Counsel for the applicant argued as his final ground that from the language of the introductory paragraph of the show cause letter it is clear that the respondent had made up its mind to dismiss the applicant even before hearing him. Although I do not have to deal with this ground in the light of my finding in respect of ground (2) I think it is appropriate for the sake of completeness that I address this point. What that paragraph states is that the respondent, as a result of a report it had received had decided as the disciplinary authority concerned to take disciplinary action against the applicant with a view to dismissal under General Order 26. What has to be emphasised is the fact that the action was being taken only with a view to dismissal under General Order 26 which specifically lays down the procedure. That statement is then followed by the charge. It can only mean what it says and cannot be read as indicating that the respondent had already made up its mind to dismiss him without first considering his representation. It is clear from the provisions of this General Order that a *prima facie* case has first to be made out from information it has received before an officer is called upon to answer the charge by way of a written representation (See para. (2)). That was clearly what happened in the present case; upon receipt of a report the respondent decided (obviously after considering it) to call upon the applicant to answer the charge. It cannot and should not be inferred from the language of the introductory paragraph that, as contended by Counsel, a decision had already been made to dismiss him from the service before he was asked to make his written exculpatory representation.

For the reasons given under ground (2), I make an order in terms of the application.

Also found at [1991] 2 CLJ 972